

LEGAL ALERT

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THE CONCEPT OF BENEFICIAL OWNERSHIP UNDER THE COMPANIES ACT, 2015

THE CONCEPT OF BENEFICIAL OWNERSHIP IN KENYA UNDER THE COMPANIES ACT, 2015

PREVAILING REGULATION

In compliance with the requirement of Section 93A of the **Companies Act**, Kenya gazetted the **Companies (Beneficial Ownership Information) Regulations 2020** (BO Regulations) requiring companies to submit details of their beneficial owners to the Registrar of Companies (ROC).

The Beneficial Ownership (BO) E-register became operational on 13th October 2020 and the effect of this is that all registered companies are now expected to prepare a form or register setting out all the information relating to their beneficial ownership and lodge the same with the Registrar within thirty (30) days of its preparation.

The BO Regulations provide a comprehensive definition of a beneficial owner as an individual who has ultimate ownership or control over a legal entity or arrangement or the natural person for whom a transaction is carried out. This also encompasses individuals who exert ultimate effective control over a legal entity or arrangement. The term “ultimately owns or control” is further clarified in the BO Regulations as ownership being exercised through a chain of ownership or by means of control other than direct control.

QUALIFICATIONS OF A BENEFICIAL OWNER

In accordance with the BO Regulations , an individual qualifies as a Beneficial Owner if they meet any of the following criteria:

1. Holding at least 10% of a company's issued shares, either directly or indirectly.
2. Exercising at least 10% of voting rights in a company, either directly or indirectly.
3. Holding the right, either directly or indirectly, to appoint or remove a company director.
4. Exerting significant influence or control, directly or indirectly, over the company, including those making pivotal strategic decisions affecting the business.

DISCLOSURE OF BENEFICIAL OWNERSHIP IN KENYA

Disclosure of BO information is mandated as follows:

A. **Disclosure by the Company:**

- To the Registrar of Companies.
- To a procurement entity if the company engages in public procurement.
- To a contracting authority if the company participates in Public Private Partnerships (PPP).
- To the court when necessary.
- To a third party, with written consent.

B. **Disclosure by the Registrar:**

- May disclose BO information to various entities, including the Public Procurement Regulatory Authority, Competent Authorities, Public Private Partnership Committee, and the Court.

C. Disclosure by the Public Procurement Regulatory Authority (PPRA):

- Shall publish BO information of entities awarded tenders by procuring entities or contracting authorities on its public portal.

D. Disclosure by the Government:

- The government may reveal BO information to the public if such information impacts the nation's interests.

FILING BENEFICIAL OWNERSHIP INFORMATION WITH THE REGISTRAR OF COMPANIES

- A company is required to enter the following particulars of the beneficial owner in the register as set out under Regulation 3 (3) of the BO Regulations – the full name; the birth certificate number; the national identity number and the passport number; the nationality; the date of birth; the postal address; the business address; the residential address; telephone number; the email address; the occupation or profession; the nature of ownership or control; the date the person became the beneficial owner; the date the person ceases to be a beneficial owner and any other information that may be required by the registrar from time to time.
- The company takes the reasonable steps to identify any person it is aware of or has reason to believe is a beneficial owner of the company.

- The Company issues a Notice to a person it has identified as being a beneficial owner requiring them to provide the particulars set out in (1) above and any person in receipt of the said Notice must comply with the BO Regulations within 21 days from the date of the Notice.
- The Company is required to keep a register of its beneficial owners separate from the register of members; The BO information can be kept either in a manual register or in an electronic Register.
- The company fills in the said information in a prescribed form BOF 1 under the BO Regulations and uploads the information electronically via the BRS Platform.
- The company is required to submit a copy of the BO register to the Registrar of Companies within 30 days of preparation. After that, an update of any changes in beneficial ownership information is to be submitted in a timely manner and the Registrar ought to be notified within 14 days of such change.

What happens in the event the beneficial owner fails to provide his/her details?

In the event a beneficial owner fails to provide the company with their details, it shall issue a warning notice to the person stating inter alia its proposal to restrict the relevant interest the person holds in the company and explain the effect of the restriction.

The company shall file a copy of the Restriction with the Registrar within 14 days from the date of issuance and the effect of a restriction issued with respect to a relevant interest is:

- Any transfer of the beneficial owner's interest is void;
- No rights are exercisable in respect to the beneficial owner's interest;
- No shares may be issued in right of the beneficial owner's interest; and
- No payment may be made of sums due from the company in respect to the beneficial owner's interest.

What happens in the event a company is unable to trace the beneficial owner.

The Company is obligated to notify the ROC of any difficulty in identifying or tracing its beneficial owners to enable the Registrar to record this information in the register of beneficial owners.

Consequence of non-compliance by the company

If a company fails to comply, the company, and each officer of the company who is in default, commits an offence and on conviction are each liable to a fine not exceeding Kenya Shillings five hundred thousand (Kshs. 500,000) for a first offence and an additional fine of KES 50,000 per day for continuing non-compliance.

Conclusion

The BO Regulations are designed to improve accountability among companies in Kenya and promote transparency, combat illicit activities, and establish a culture of legal compliance for companies.

It is therefore imperative for companies to conduct a comprehensive assessment of their existing ownership and control frameworks and ensure compliance with the BO Regulations.

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